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Current Topics.

Company Law Reform.

THE Government has wisely decided that the subject of company law reform will be rendered an even more unavoidable task than it has been in the past few years by the needs of post-war reconstruction. Readers will recall many discontents that have been raised since the passing of the Act of 1929. There have been the questions of the disclosure of the individual profits and losses of subsidiary companies, of nominee shareholdings, the problem of defining "profits," of fuller disclosure in accounts, of the duties of auditors and a host of other matters which have been discussed from time to time. On 29th June the President of the Board of Trade announced in the House of Commons that he had appointed a committee with the following terms of reference: "To consider and report what major amendments are desirable in the Companies Act, 1929, and, in particular, to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest." He said that COHEN, J., had consented to act as chairman and announced the names of the other members of the committee (see *ante*, p. 238). In answer to a question by Sir JOCELYN LUCAS, Mr. DALTON said that, following on a conversation he had had with COHEN, J., he had no doubt that nominee shareholdings and the possibility of their abuse would be one of the matters the committee would go carefully into. Both the wide terms of reference of the new committee and the appointment of its personnel from the Bench, the legal and accountancy professions and representatives of the investing and of the general public will command general satisfaction. On the question of public interest, only the most complete publicity with regard to the accounts of the large companies and interlocking associations of companies which are a feature of modern life can prevent a shifting of real sovereignty in the State from the people to an economic oligarchy. So far as the investing public is concerned, the personnel of the committee is a guarantee that their interests will be adequately protected.

General Council of Solicitors in Scotland.

SOLICITORS in England will extend hearty congratulations to the General Council of Solicitors in Scotland on the occasion of its tenth anniversary. Sir ERNEST M. WEDDERBURN, D.K.S., chairman of the council, at a luncheon celebrating the anniversary on 25th June, compared the General Council to a precocious child of ten years of age, who, having already reached the years of adolescence, was seeking fresh adventures. It had therefore refused, he said, to be content with its statutory duties and concerned itself with any matters which were for the good of the profession and which would enable it more fully to serve the public. It was their constant aim to increase the usefulness of the profession in the life of the community by the insistence on high ideals of professional conduct and on a high educational standard for those entering the profession and for the training of apprentices. He added that the attitude of the legal profession towards the community was well typified by their attitude to the assistance of poor persons, and it was one of their proudest boasts that for more than 500 years no poor person in Scotland had been denied access to the courts on the ground of poverty. The whole of the administration of the poor law procedure was carried through without any cost to the State by disinterested services given by solicitors throughout the country, and Sir ERNEST contrasted this with the State grant of £9,500 for the purpose of poor persons procedure in England. In defence of English solicitors and barristers, it needs to be said that the call for State funds is not due to any lack of disinterested service on their part, and in any case the amount contributed is negligible compared with the population involved. Another important matter referred to by Sir ERNEST WEDDERBURN was the creation of so many statutory offences in which *mens rea* was absent. He viewed this fact with concern, and the legal profession, he said, must particularly protest against the denial of the right of their clients when summoned before certain tribunals to be represented by their solicitors in matters which were often so complex that even a solicitor, barrister, M.P., or civil servant might find them hard to explain. English solicitors will join hands with their Scottish brethren on this matter. It is well known that the unaccustomed atmosphere of a court or even a tribunal may effectively tie the tongue of a nervous applicant, and the denial of representation may often amount to a denial of justice. The profession in England will wish many more decades of useful work to the General Council of Solicitors in Scotland.

Hearings *in Camera*.

IN the "Current Topics" appearing in this journal of the 26th June, we noted the war-time phenomenon of a hearing *in camera* of a food prosecution under the Defence (General) Regulations, 1939. The discretion which is vested in all courts to try any cases *in camera*, as we then pointed out, is limited by s. 6 of the Emergency Powers (Defence) Act, 1939, and can only be exercised when the court is satisfied that it is expedient in the interests of public safety or the defence of the realm that (*a*) throughout, or during any part of the proceedings such persons or classes of persons as the court may determine shall be excluded, or (*b*) the disclosure of information with respect to the proceedings be prohibited or restricted. It is clear that all prosecutions under the Defence (General) Regulations, 1939, are conducted in the interests of the defence of the realm, but in these cases the court must decide also whether the paramount needs of defence or safety override the fundamental democratic principle of publicity in the administration of justice. It is our firm submission that only a strong case of need justifies this overriding action on the part of the courts. The matter was taken up in the House of Commons on 29th June by Sir JOHN MELLOR, who asked the Parliamentary Secretary to the Ministry of Food in how many cases applications had been made by officials of his Ministry to courts of summary jurisdiction for hearings *in camera*, under what statutory authority such applications were made, and upon what grounds. Mr. MABANE replied that application had been made by officers of his department for a part of one case to be heard *in camera*, and that that application had been granted. It is satisfactory to know that these applications are rarely made, at any rate in food prosecutions. It needs a courageous magistrate to refuse an application by a Government department in war-time to act under s. 6 of the Emergency Powers (Defence) Act, and we therefore hope that Parliament will continue to watch and to inquire into any case that may arise of what may seem to be undue demands by Government departments in this respect.

Married Women's Property.

IN the House of Commons on 24th June, Mr. HAMMERSLEY asked the Home Secretary whether he would consider the desirability of introducing legislation to provide that when justices sitting at a matrimonial court make a separation order or maintenance order, and where the total value of the furniture and effects does not exceed £300, the justices should be given power to allocate the furniture between the husband and wife, either in accordance with an agreement arrived at between the parties or, in accordance with suggestions put forward by probation officers after a visit to the home for an investigation of all the circumstances of the case. Mr. MORRISON replied that a similar proposal was made when the Summary Jurisdiction (Separation and Maintenance) Bill of 1925 was before the House, and was withdrawn after a short debate, mainly because of the objection which was felt to imposing on courts of summary jurisdiction the difficult task of dividing property according to their views of what would be equitable, unguided by any legal principles. Mr. HAMMERSLEY then asked whether it was appreciated that the present position, whereby the assets of the home in cases of this kind automatically became the possession of the husband, was neither in accordance with modern sentiment nor with the changed circumstances of the times, and, having

regard to the fact that the problem was becoming increasingly difficult, and that great hardship was being caused all over the country, could there not be an inquiry. Mr. MORRISON, in reply, doubted whether in the circumstances he could take that step. If there was agreement between the parties, there should be no difficulty about the division. He did not like the idea of probation officers or courts entering into disputes between husband and wife and making an arbitrary division. There is no need to consider any proposal that the division of property between husband and wife should be left to the discretion of a probation officer. It is difficult to imagine that such a suggestion would receive any support worth mentioning. It is the experience of solicitors practising in the matrimonial courts that where there is a breaking up of the matrimonial home there usually follows an insistence on a strict regard for legal rights in the consequent division of the real and personal property which has been available for the joint use of the parties. It is a pity that rights as to maintenance and custody have to be determined in one court under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and property rights have to be decided in another under s. 17 of the Married Women's Property Act, 1882. These extra costs may be inevitable, but there is at least a case for a fuller statement of the reasons why they should be incurred.

Growing Trees as "Goods."

AN interesting claim was heard by the General Claims Tribunal on 26th and 27th May, involving the question whether growing trees are "goods" within the meaning of the Compensation (Defence) Act, 1939. The case is reported in *The Estates Gazette* of 26th June, 1943. A landowner sold growing timber on his land for £14,750. The contract, which was dated 22nd July, 1940, provided that the price should be paid on the signing of the agreement, that the timber should be felled and removed by 30th September, 1947, and that any property in any tree should not vest in the claimants until the whole of the purchase-money was paid, or until the tree was removed from the premises. It was also provided that if through action or order or otherwise in any way by the Government or authority in power for the time being, or by enemy action, or by any other cause whatsoever arising out of the war or any prolongation or continuation thereof, the claimants should not have completed their part of the agreement by the due date, then, at the claimant's option: (1) the agreement should be extended for such period as might be mutually agreed, or, failing agreement, the matter should be referred to arbitration; or (2) the vendor should return such portion of the purchase price as might be agreed, or, failing agreement, the matter should be referred to arbitration. On 5th July and 30th October, 1941, the Crown took possession of all the land on which the growing timber stood, amounting to 580 acres. On 12th September, 1941, the authority had made an order under reg. 50 (2) of the Defence (General) Regulations prohibiting the cutting, lopping, topping or felling of timber on the land taken on 30th October. On 16th December, 1941, another order under reg. 51 prohibited the exercise of any rights relating to the land of which possession had been taken which were enjoyed by any person whether by virtue of an interest in the land or otherwise. On behalf of the claimants, i.e., the purchasers, it was stated that if the trees were goods, the claimants were entitled to be paid for them, but if they were land no compensation was payable. The definitions in the Compensation (Defence) Act gave no real help. In s. 62 of the Sale of Goods Act, 1893, "goods" were defined as including all chattels personal other than things in action and money, and included emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale. The authority's argument was that the definition in s. 17 of the Compensation (Defence) Act, 1939 ("chattels other than vessels, vehicles or aircraft"), altered the law as laid down in the Sale of Goods Act. *Jones & Son, Ltd.* v. *Tankerville* [1909] 2 Ch. 440, it was said, decided that growing trees were goods within the Sale of Goods Act. Reference was also made to LORD ESHER'S dictum in *Att.-Gen.* v. *Horner*, 14 Q.B.D., at p. 257, that an Act of Parliament was not to be construed as interfering with or injuring a person's right to compensation unless one was obliged so to construe it, and if a reasonable construction was possible without producing such an effect, such construction should be adopted. Many authorities were cited to show that growing trees were part of the land and not chattels, and it was stated that the only reason why the Sale of Goods Act definition had been inserted was to avoid the endless disputes arising before 1893 as to whether a sale of growing fixtures and timber came within s. 17 or s. 4 of the Statute of Frauds. It was also submitted on behalf of the authority that LORD ESHER'S dictum in *Att.-Gen.* v. *Horner* did not apply, as the claimants had their remedy against the vendor on the contract of sale. The Tribunal's award was that it having been agreed that only the question of principle be decided, leaving any question of amount to be determined later, and further that the only subject-matter of the award was timber still standing, there had been no acquisition or requisition of goods within the meaning of s. 6 of the Compensation (Defence) Act, 1939, and that the claim failed, with costs against the claimant.

Borrowing by Local Authorities.

IN a circular from the Treasury, dated 1st June, and issued to all local authorities, joint boards, joint committees, joint electricity authorities, port health authorities, catchment boards and drainage boards in England and Wales, and county, town and district councils, joint boards and joint committees in Scotland, reference is made to Treasury Circular dated 1st July, 1942, regarding the control of borrowing by local authorities. The present circular gives notice that as from the date of the circular, and subject to the conditions below, the Treasury consents for the purpose of reg. 6 of the Defence (Finance) Regulations to the renewal, replacement or other amendment of mortgages without specific consent until 31st December, 1944. The conditions are: (*a*) For the purpose of the circular "mortgages" include, as hitherto, a local bond, corporation bond, or any similar security not marketable or quoted on any Stock Exchange, but do not include bills or promissory notes; and "replacement" does not include replacement except by other mortgages as here defined. (*b*) No mortgage shall be issued or renewed on terms providing for repayment before a date seven years after the date of issue or renewal, except that (i) it will be permissible to issue mortgages repayable by equal instalments of capital at regular intervals or by an annuity of constant amount, provided the full currency of the mortgage or renewal is not less than seven years; (ii) the period of any mortgage will not be regarded as determined by the inclusion of a "stress clause" under which the lender is entitled tp premature repayment in emergency; (iii) mortgages may be renewed or replaced for a shorter period than seven years if the terms of any loan sanctions identifiable as specifically governing those mortgages would not permit of a longer renewal or borrowing. (*c*) All new or renewed mortgages shall be made for a definite term, and it shall not be a provision of any new or renewed mortgage that after reaching the stipulated date for payment or renewal it may continue to run indefinitely at six months or other short notice. This general consent relates only to the renewal and replacement of mortgage debt. New borrowing on mortgage and all borrowing by issue of stock will continue to be the subject of specific consent by the Treasury. It should, however, be noted that it is the intention of the Treasury to specify conditions (*b*) and (*c*) of the preceding paragraph in any consent to new mortgage borrowing issued after the date of the circular. In regard to condition (*b*), it is the Treasury's considered view that the present level of interest rates affords a favourable opportunity for local authorities to spread maturing capital obligations over a longer period of years, and in particular to reduce the volume of mortgages maturing within seven years. The borrowing period should, whenever possible, exceed seven years, which should be regarded as a minimum. In regard to condition (*c*), the ban on the creation of further mortgages which in time would run subject to short notice on either side will effect a gradual but slow reduction in the volume of this debt, which is uneconomic and always a potential source of difficulty. It is expected that many authorities will be able and willing to take opportunities of placing such obligations on a more satisfactory basis. It is stated that, subject to the observance of the new conditions, the effect of the circular is to abolish the previous limits on the conversion of mortgages at the instance of local authorities and to grant them full discretion, subject to the terms of the existing loan and of the circular, to negotiate reductions of interest or extensions of period, or both. The hope is expressed that the authorities will do their utmost to avoid capital expenditure and to defray unavoidable expenditure to the greatest possible extent either from revenue or from available funds, and will always consider carefully, before renewing maturing debt or replacing it by fresh borrowing, how far it is possible for the maturing debt to be repaid out of internal funds which can be made applicable. The object of the present control of capital issues is, of course, to reduce to the unavoidable minimum all calls on the capital resources of the nation which compete with the urgent needs of the national Exchequer. Questions of interpretation and all applications for specific consent should be addressed to the Secretary, Capital Issues Committee, Welcombe Hotel, Stratford-upon-Avon, unless the application also involves an approach to a sanctioning department.

Recent Decisions.

In *In re Metcalfe, deceased*, on 29th June (*The Times*, 30th June), HODSON, J., admitted to probate a complete copy of a will which had been lost, possibly through being given away for salvage purposes. Evidence had been filed as to due execution.

In *Ex parte Deverell* in the Divisional Court on 29th June (*The Times*, 30th June), the LORD CHIEF JUSTICE and OLIVER, J., refused leave to apply for an order of *certiorari* to bring up and quash an order by a hardship tribunal refusing to grant the applicant exemption from fire-watching duties imposed by the Civil Defence Duties (Compulsory Enrolment) Order, 1942. The court held that in their view conscientious objection to war service could not be considered to be a case of exceptional hardship within the order, and the hardship tribunal had no jurisdiction to hear the application.

Law Reform (Frustrated Contracts) Bill, 1943.

Law Revision Committee Report, 1939.

At last, on 22nd June, 1943, the promised Bill that had for so long been under consideration was introduced into the House of Lords by the Lord Chancellor. On 29th June it was given a second reading, and will apply to contracts discharged upon frustration *on or after 1st July*, 1943. The Law Reform (Frustrated Contracts) Bill, 1943, implements the *Seventh Interim Report* of the Law Revision Committee (of which Lord Wright was the Chairman), presented as a Command Paper to Parliament in May, 1939 (1939, Cmd. 6009). In the committee's view, what was then called "the rule in *Chandler* v. *Webster* [1904] 1 K.B. 493"—viz., that, after a frustrating event, "the loss lies where it falls"—should be changed and (as is the rule in Scotland, the United States and the civil law countries) "unearned benefits" should be returned. They accordingly recommended that, *unless a contrary intention appeared from the contract*, money paid before frustration should be recoverable, subject to a fair allowance for expenditure incurred in or for performing the contract. There would be an allowance for overhead expenses, but benefit to the payee from this expenditure would also be taken into account. Loss of profit should be excluded. Where, at frustration, the contract was part performed and that part was severable, the new rule would apply only to the part unperformed. No regard should be had to amounts receivable under insurance policies. No change was recommended in the law relating to freight *pro rata itineris*, whereby, unless otherwise agreed, freight is only payable if the contract of carriage is completely performed (Appendix B, *ibid.*); nor was any alteration recommended in the law relating to *advance freight* which, in general, is irrecoverable where the ship and goods have been lost and freight is not earned (*Byrne* v. *Schiller* (1871), L.R. 6 Ex. 319, 325, 326, *per* Cockburn, C.J.). See also *per* Viscount Simon, L.C., in the *Fibrosa* case, *infra*. The committee, however, did recommend that hire paid in advance under a *time charter* should, upon frustration, be recoverable in the same way as other payments in advance under a contract.

The Fibrosa Case, 1942.

Chandler v. *Webster*, *supra*, was overruled by the *Fibrosa* case decided last June ((1942), 58 T.L.R. 308; [1943] A.C. 32). The plaintiffs were held entitled *in quasi-contract* to the repayment of money paid in advance on account of the purchase price of machinery where, delivery to Poland becoming impossible after the outbreak of the present war, *the consideration had wholly failed*. The Lord Chancellor stated, however, that this result did not deal fairly with the parties in all cases. The recipient who must return the money may have incurred expenses; he may have executed almost all the contractual work. But English common law did not apportion a prepaid sum in such circumstances. The remedy of an "equitable apportionment of prepaid moneys" was for the Legislature (at p. 311 of 58 T.L.R.). Thus also, Lord Atkin (at p. 313). Moneys paid before frustration could not be recovered if the person making the payment had received some part of the consideration (*per* Lord Russell of Killowen, at p. 313). Lord Wright doubted whether the benefit of part performance could be recovered. The English rule, depending on "an entire consideration and a total failure" was "a rough justice"; "some day," he ventured, "the Legislature may intervene to remedy these defects" (*ibid.*, at p. 317). See also *per* Lord Porter, at p. 318.

The New Bill: Second Reading.

The unanimity in the *Fibrosa* case upon the need for reform was no doubt the effective or final cause of the present Bill, which appears to exhibit a careful synthesis of the views of several minds. The phraseology of certain clauses could, with advantage, be improved in committee. The provisions of the Bill implement and to some extent go beyond the recommendations of the Law Revision Committee. The draftsman, it is presumed, has had before him the provisions made by the law as administered in the United States.

The Lord Chancellor, with superb simplicity of language, moved the second reading (Official Report, 29th June, 1943, cols. 135–151). "A measure of real importance to the ordinary man," he described it, and "a great improvement in the present law." The rule (in *Fibrosa*) that the man who has received his prepayment must hand it back, though very simple, is yet sometimes very harsh: the recipient may have acquired materials or started manufacture; he may have done work or expended money. *The first object* of the Bill was to alter that. The recipient must hand back the prepayment, but he can set off the expenditure which he has already incurred in connection with the contract. Has he received £1,000 and spent £800 in part performance? He must return £200 (cl. 1 (2)). *The other object* was this: There may have been delivery of a portion, say of the machinery ordered: before frustration the other party has received a valuable benefit. He must pay for it (cl. 1 (3)). At present, apparently, if the contract price is not payable until completion and the contract is frustrated, he need not pay. If a decorator has agreed to paint a house for £*x*, and if and when he has done half the work, further work is prohibited by Defence Regulation, he should be entitled to recover "a fair amount" for what he has done. Viscount Simon, L.C., referred to two other matters. Since the Bill is already well known in the commercial community, its provisions remedying the present injustice will apply as from *1st July*, so that, as soon as possible, existing contracts may have the benefit (cl. 2 (1)). Lastly, *charter-parties* (other than time charters) are excepted (cl. 2 (5)). It has long been established as "part of the general maritime law" that advance freight is not repayable even though ship and cargo are lost before delivery, and that, unless agreed, freight (other than advance freight) is only payable on complete performance. Any alteration would involve "substantial modification of the present insurance practice" which seems "unnecessary and undesirable." There is no such accepted rule relating to time charters and charters by demise, which have, since the present war, come into common use again by the British and American Governments.

Lord Nathan pointed out that frustration does not always impose a loss on the seller who may find himself in a very much better position. He may, for example, get more for the agricultural machinery than the price under the frustrated contract. Would not cl. 1 (5), Lord Nathan asked (whereby no account is to be taken of moneys due under a contract of insurance), enure to the benefit of the insurance company? And what is the position relating to frustrations occurring, or litigation instituted, before 1st July? He hoped that the Law Revision Committee would be asked to "tidy up" during the war various other difficult points outstanding which raised no controversial question. Viscount Hailsham declared that "the common law cannot empower the court to make any equitable adjustment of the loss. That is matter for the Legislature." The function of the common law is to give effect to the intention of the parties, but, normally, the parties do not bargain what is to happen in the event of the frustration of their contract. The Bill will not compensate for *loss*. (The Bill does not say so in terms but this follows from its language.) Where one party has benefited and the other has spent money, "the court may adjust the benefit to the expense and the expense to the benefit." Viscount Hailsham congratulated the Lord Chancellor, declaring that the Bill had the blessing of Viscount Maugham (who, in May, 1937, when Lord Chancellor, had referred the problem to the Law Revision Committee). Lord Wright said that the Bill was overdue; it would meet with "the applause of the commercial and legal community." Lord Teviot stated that the Bill was welcomed by 100 chambers of commerce and 50,000 industrial and commercial firms. There would be no interference with the liberty of the parties to insert a "frustration clause" (cl. 2 (3)). He thought that the Bill should go further and provide that *whether there has been pre-payment or pre-benefit or not*, the court should effect adjustment by awarding an allowance for expenditure and setting it off against allowances for benefits accruing under the partly performed contract. Other points might arise on the committee stage.

Lord Macmillan, though present, did not take part in the debate; one would have welcomed a speech from him upon the rules prevailing in Scotland and how far the Bill was in harmony with them. *Fibrosa* brought English into line with Scottish law. The point is material; we hope that it will be illuminated in committee.

The Lord Chancellor, in his reply, admitted that the Bill did not provide "the very much wider treatment." But the judge will already have a very difficult task: "it is not like deciding who is right and wrong in law; it is a question of the distribution of responsibility." It would be a mistake to ask the courts, in effect, "to remake contracts for people in all sorts of circumstances." (Upon "the revision of contracts," see the report of the Pre-War Contracts (Buckmaster) Committee, 1917, Cmd. 8975 (1918), paras. 11 and 13 (*d*), and their statement of the law in para. (10) adopted by the Andrewes—Uthwatt Committee on War Damage (1939), Cmd. 6100, para. 4.) The object of cl. 1 (1), Viscount Simon continued, was to preserve the rights of insurance companies either by limiting the losses or giving subrogation rights, but he would look into the clause again. The provision in cl. 2 (1) only applies where frustration occurs in the future, i.e., on or after 1st July, 1943; where frustration has occurred before that date, the old law will govern.

The Bill: Exclusions.

1. The Bill does not apply to *Scotland* (Cmd. 6009, Appendix A), which already accepts the principle of restitution. (See *per* Lord Macmillan in *The Fibrosa* case, *ibid.*, at p. 314; and *per* Lord Shaw in *The Cantiare* case [1924] A.C. 226, 259.)

2. The Bill does not apply to a *charter-party*, except a *time charter-party* or a charter-party by way of demise, nor does it apply to a *contract for the carriage of goods by sea* (cl. 2 (5)).

3. Nor does the Bill apply to a contract to which *s.* 7 *of Sale of Goods Act*, 1893, applies, avoiding contracts for specific goods which perish before the risk has passed (cl. 2 (6)).

4. The Bill does not apply where the contract contains *a provision for the risk of frustration* (see *per* Lord Atkin, in *The Fibrosa* case, *supra*, at p. 313), save in so far as the Bill appears to the court to be consistent with such provision. The eight

lines of cl. 2 (3) implement the recommendation of the Law Revision Committee that the change in the law should only apply "unless a contrary intention appears from the terms of the contract." The contract may exclude repayment (see *per* Lord Wright in *The Fibrosa* case, *supra*, at p. 316); or the parties may make a special provision in the event of frustration, or to apply in any event, or upon an event which, but for that provision, would frustrate the contract. This seems to be the effect of cl. 2 (3).

5. Where a contract is *severable*, a part wholly performed before frustration (or wholly performed save for the payment of an ascertainable sum) will be treated as a separate contract wholly performed, and the provisions of the Bill will apply to the remainder only (cl. 2 (4)). Severance is normally the act of the parties (*per* Salter, J., in *Putsman* v. *Taylor* [1927] 1 K.B. 637, 640). Is it under this sub-clause to be an act of the court?

Its Application.

1. The Bill will apply to contracts made *before or after* its commencement, which are frustrated *on or after 1st July*, 1943, but not to contracts which are frustrated before that date (cl. 2 (2)).

Hence the common law upon restitution will remain material. *Fibrosa* does not become obsolete. Nay, rather, its implications will be investigated the more. Quasi-contractual restitution—it seems to have been assumed—only applies where there is a *total failure of consideration*. But it cannot be too strongly stressed that the observations made in *Fibrosa* that English law cannot apportion prepaid moneys—despite their very great weight—are ultimately *obiter dicta* only. That question did not in that case arise. One day it will arise, and we hope that it will fall to be determined by the same members of the House. Despite their present doubts, we hope that the House, bearing in mind Lord Mansfield's statement of "the basis of the modern law of quasi-contract" (*per* Lord Wright, *ibid.*, p. 315) that "the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money" (*Moses* v. *Macfarlan* (1760), 2 Burr, 1005, 1012), will exercise that "judicial valour" in which in recent years it has been so conspicuous, and will do justice even if there is only a partial failure of consideration. True, "the judges have to decide what the law is. It is not for them, in cases of which they find that the law works harshly, to declare it something different to what it really is" (The Lord Chancellor, *op. cit.*, col. 139). But until *Fibrosa*, *Chandler* v. *Webster* held the field; indeed, Viscount Buckmaster's committee accepted the latter decision as the law, having heard evidence from Lord Roche (then at the Bar), and having been supplied with notes on the law by Mr. R. A. Wright, K.C. (as he then was). Quasi-contract has only recently come into its own in English law.

2. The Bill will apply to contracts to which *the Crown is a party*. The Crown, like any other party, will be bound to repay (cl. 2 (2)).

The law of proceeding against the Crown remains as it was: the procedure of petition of right remains unaltered, save where by statute specific ministers or departments may be sued by action (cf. *Minister of Supply* v. *British Thomson Houston, Ltd.* (1943), 1 All E.R. 615; 87 Sol. J. 229).

Adjustment of Rights and Liabilities.

The new adjustment proposed of the rights and liabilities of parties to frustrated contracts is contained in the six sub-clauses of cl. 1.

(1) The following provisions—subject to cl. 2—will apply where a contract governed by English law (i.e., where according to its "proper law" as the term is understood in private international law, English law applies), "has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract."

The draftsman boldly describes *a contract* as frustrated; in origin, it is the "mutually contemplated" adventure of the parties that has been frustrated; nevertheless, "frustration of contract," though inaccurate, is convenient.

But why "impossible of performance *or otherwise* frustrated"? Is the first limb necessary? Is not the word "otherwise" limitative in scope? The Bill surely should apply to all contracts for whatever reason frustrated.

The term "frustration" (it will be observed has not been, and cannot be precisely defined. The Bill is concerned not with frustration, but with the effects of frustration. For the most recent and illuminating explanation of the principle of frustration, see Prof. Winfield's edition of "Pollock on Contracts" (1942), 11th ed., p. 235; and see Lord Wright's comment (1943), 59 L.Q.R. 122, 124.

The discharge from performance must have been caused by the frustration which must not be "self-induced" (*Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* [1935] A.C. 524, 530, 531, *per* Lord Wright).

(2) *The core of the new rule of restitution is cl.* 1 (2): All sums paid under the contract before "the time of discharge" shall be recoverable *as money received for the use of the party who paid*. All sums payable thereunder, will cease to be payable: Provided that if the payee incurred *expenses* before the time of discharge in or for performance of the contract, the court may, if *in all the circumstances it considers it just*, allow him to retain or recover all or part of the sum paid or payable, but not more than the expenses.

"Expenses" does not include "loss." Though this would appear to be obvious, we think that it is preferable for the Bill to state this explicitly. The Law Revision Committee's Report is explicit on this point.

The gist of this new statutory cause of action will be quasi-contractual: "as money received by him for the use of the party by whom the sums were paid." The claim will not be based upon the contract "but on the fact that the defendant has received the money and has on the events which have supervened no right to keep it" (*per* Lord Wright in the *Fibrosa* case, *supra*, at p. 315).

We hope that Lord Teviot's point suggesting that the remedy be amplified to include adjustment, whether there has been prepayment or pre-benefit or not, will be carefully considered in committee.

"The court" means the court or arbitrator by or before whom the matter falls to be determined" (cl. 3 (2)). What will the position be when the days of trial by jury return? Is it to be governed by the procedure applicable to actions in contract? "The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort" (*per* Lord Wright, *supra*). Or rather, is not the intention that this very difficult "distribution of responsibility" be reserved for the judge alone? Viscount Simon appeared to hint that the matter is for a judge alone (cols. 149, 150). We respectfully think that this is right and that the Bill should so provide explicitly.

(3) Where a party has obtained *a valuable benefit* (other than money), because the other party has done something in or for the performing of the contract, that other party may recover such a sum as the court, in the circumstances, thinks just. Among the circumstances to be considered are (*a*) the amount of expenses incurred before discharge in or for performing the contract by the benefited party, and (*b*) "the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract." This language seems to us unduly awkward—"very unstimulating" (col. 139)—and we wonder whether (*a*) and (*b*) are strictly necessary; are they not included in "all the circumstances of the case"? The illustration Viscount Simon gave was of the decorator who, after painting half the house, was not allowed, by Defence Regulation, to continue; he should be paid for the work that he had done.

(4) In estimating "expenses," the court may include a reasonable sum for *overhead expenses* and for work or services *performed personally* by the party (see on cl. 1 (2), *supra*). "Overheads" are specified because they cannot be appropriated to a particular contract. "Personal services" are specified because the *cost* of these is not strictly an "expense" which can be appropriated to the contract. But unless it is provided that "expenses" does not include "loss," we can foresee multitudinous claims for all kinds of loss described as "expenses."

(5) Sums payable, by reason of the frustration, *under a contract of insurance*, are not to be taken into account: Provided that, under cl. 1 (3) (*b*), a sum payable to a benefited party for loss of a "valuable benefit" may be taken into account: This sub-clause will probably be considered in committee; it needs to be amplified and the position of insurance companies clarified.

(6) This is a new and useful provision, although in wording somewhat involved. Could it not be simplified?

Where a person has "assumed obligations" in consideration of the other party conferring a benefit either upon him or upon a third person, the court may (if it think it just to do so in all the circumstances) treat the benefit conferred on the third person as a benefit obtained by the person assuming the obligations.

Common-sense Apportionment.

The Bill is both a careful and a courageous attempt to effect, upon frustration, an equitable adjustment between the parties. As Lord Macmillan, in his philosophic speech in the *Fibrosa* case, pointed out (*supra*, at p. 314), to leave matters as they stood is "a confession of impotence"; to attempt to restore them in their entirety is "to attempt the impossible": at best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice." See also *per* Lord Roche (at p. 318). The Bill lays down the principle that, upon frustration (subject to an express provision in the contract and to the rule of severability), moneys paid shall be recoverable subject to a fair deduction for expenses incurred in and about the performing of the contract. The arithmetical computation is entirely a question of fact and common-sense adjustment for the court in each case as it considers "just"—"having regard to all the circumstances of the case." No one case, therefore, should, strictly, be an authority for another. "A discretion which is unfettered by law must not be fettered by judicial interpretation of it" (*per* Scott, L.J., in *Luccioni* v. *Luccioni* (1943), 1 All E.R. 384, 385).

No doubt much work which will inevitably arise from the Bill will go to arbitration, particularly where a nice adjustment of conflicting figures is required.

Postscript.—Since the above article was written, on 6th July the Bill passed through Committee and was reported to the House without amendment.

A Conveyancer's Diary.

Occupier's Liability : Bombed Premises.

Leanse v. *Lord Egerton* [1943] 1 K.B. 323 appears to be a somewhat surprising case, and I am tempted to wonder whether the value of the report may not have suffered from war-time brevity. The defendant owned a certain house in Curzon Street, which suffered damage in an air-raid during the night of Friday-Saturday, 15th–16th November, 1940. Among other things, one of its windows was broken, and on Tuesday, 19th November, a piece of glass fell from this window and injured the plaintiff, who was walking along the street. The report states that " at the relevant times neither the defendant nor any caretaker employed by him lived on the premises, and the defendant had no actual knowledge of the state of the premises." It appears from the judgment that the house was empty of furniture. The report does not state when the fact of the window being in a dangerous state first came to the knowledge of the defendant's servants or agents, but it is stated that no action in the matter was taken on the Saturday or Sunday, " because the offices of the defendant's agents " (i.e., his estate agents) " were shut on those days and there was difficulty in getting labour during the week-end." One might have expected the report to add that it was not entirely easy to get labour of any kind at a moment's notice in London in the autumn of 1940, as some of us remember rather clearly. However, by the Monday the defendant's agents had heard of the state of the premises, and that day instructed builders to attend to them. The accident happened before the builders " could do anything." It is unfortunate, I think, that the facts are not more fully reported and that the arguments of counsel are not reported at all.

The Lord Chief Justice gave judgment for the plaintiff. He began by saying : " The law is not really in question, nor is it difficult." He then quoted a passage from the speech of Lord Romer in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 913, where Lord Romer adopted certain remarks of Lord Maugham in the same case dealing with the liability of an occupier for " continuing " a nuisance which he has not caused. The operative words are " the occupier continues a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so."

On this basis, the Lord Chief Justice held that the house was " a danger to people passing on their lawful occasions along the road " from the moment the damage occurred ; " in other words the house was a nuisance in the condition in which it was." " There was no one on the premises to watch or take care if anything happened to the house or to remove anything which made it a nuisance . . . *The matter must be treated in precisely the same way as it would be treated if the defendant or some one on his behalf had lived there.*" Hence the defendant had " presumed knowledge " of the state of the building on the Saturday morning. It was no defence that steps were taken on the Monday. " In my view the house should not have been left as it was, because it was inconvenient or difficult or troublesome to make arrangements with regard to it at once . . . The difficulty of getting labour on a Saturday . . . does not seem to me to excuse the defendant from liability."

Since this conclusion was taken to follow from *Sedleigh-Denfield* v. *O'Callaghan*, it may perhaps be as well to recapitulate that case briefly. The action was by an occupier of land against his neighbours for a flood caused by a defective grating in a ditch at the mouth of a culvert. The grating was on the defendant's land, but the defence was that it had been put there by a stranger. The defence failed because (*a*) the grating had been put there in 1934, while the flood occurred in 1937 ; (*b*) in the interval at least one agent of the defendant knew all about the grating, because he had cleaned the ditch out regularly. The words " presumed knowledge " used by Lord Maugham undoubtedly had reference in their context to the knowledge of the existence of the nuisance which was to be imputed to the defendants by reason of the actual knowledge which their servant had. It is not clear to me how the reasoning in that case justifies the imputation of knowledge to Lord Egerton at as early a date as he would have known of the damage had he been living in the house. Further, there does, with very great respect, seem to be a substantial difference between the circumstances of the two cases. In the one, defendants who for three years " knew " of the existence of a defective grating (through the very man whose job it was to keep the ditch clean and to report if anything needed to be done), for three years, in time of peace, took no action at all. In the other there was a defendant who at worst had " presumed knowledge " for three days before the accident, and who had actually instructed builders to put the damage right ; and all that in the very midst of the aerial bombardment of London. It does seem difficult to use of the latter defendant the words used of the former, viz., that he was liable if with knowledge or presumed knowledge of the nuisance " he fails to take any *reasonable* means to bring it to an end though with *ample* time to do so.

In *Leanse* v. *Lord Egerton* there was beyond doubt a nuisance from the moment the damage occurred. It was a public nuisance and not a private one, since the danger was to persons passing along a highway. But it is quite clear from *Sedleigh-Denfield* v. *O'Callaghan* that, on the point of continuance, there is no distinction between public and private nuisances. The nuisance was caused by a trespasser. Something might have turned on the fact that this particular trespasser was one of the King's enemies, though nothing was made of this point at the trial ; but let us for the moment treat the case as one of an ordinary public nuisance, caused to arise in an empty house by an ordinary trespasser, which nuisance, at a later date, caused particular damage to a member of the public. Those were precisely the facts in *Barker* v. *Herbert* [1911] 2 K.B. 645, a case cited with manifest approval by Lord Maugham in *Sedleigh-Denfield* v. *O'Callaghan*. In *Barker* v. *Herbert* the defendant was owner in possession of an empty house. The house had an area, which was guarded by a railing, adjoining the highway. On Sunday, 9th May, 1909, one rail was broken by some boys who were playing football in the street, i.e., by trespassers. On Wednesday, 12th May, the plaintiff, a child of four years, fell through the broken railing into the area and was injured. The interval between the nuisance coming into being and causing damage was thus three days as in the recent case, but there were two slight distinctions, which, so far as they go, would tell in favour of the defendant in the recent case, viz. : (i) that London was not under bombardment in 1909, a fact vital to the reasonableness of steps taken to cure the nuisance of 1940 ; and (ii) that in the earlier case the interval was from Sunday to Wednesday, thus including only one day, the Sunday, on which labour is difficult to get, and not from Saturday to Tuesday. *Barker* v. *Herbert* was tried by Lush, J., with a jury, to whom he put specific questions. They found the following facts : (1) That the area was a nuisance on the Wednesday. (2) That it was so by a trespasser having removed the railing. (3) That *on the Wednesday* the defendant did not know that the railing had been removed. (4) That such time had not elapsed that he should have known about it if he had used reasonable care (the defendant had given evidence that he inspected the premises once a week and had done so on Saturday, 8th May). (5) That the defendant had used reasonable care to prevent the premises becoming dangerous to persons using the highway. On these findings Lush, J., gave judgment for the defendant and his opinion was upheld by the Court of Appeal. This decision, though earlier than *Sedleigh-Denfield's* case, seems an almost perfect example of its application. It is unfortunate that the report of *Leanse* v. *Lord Egerton* does not say what cases were cited by counsel, so that we do not know whether *Barker* v. *Herbert* was. But it is difficult to see why the Lord Chief Justice considered that, apparently, as a matter of law, knowledge of the damage was to be imputed to Lord Egerton at the moment when it occurred, in face of it having been treated in the earlier case on a question of fact whether the defendant had exercised reasonable diligence to keep himself informed of the state of the premises, the court taking no exception to a finding by the jury that reasonable diligence was shown by paying visits once a week. We do not know when Lord Egerton's agents obtained actual knowledge, but it seems difficult to believe that his position would be worse for their having obtained it than was that of Herbert, who had no knowledge at all, unless the agents had been inadequately zealous in taking action. The test of such zeal is quite clearly reasonableness, according to Lord Maugham, and it does seem very difficult to say that reasonable steps were not taken, having regard to the condition of the labour market in November, 1940.

I propose on a future occasion to consider whether any, and if so, what difference is introduced into cases of this class by the fact that the nuisance is created by the King's enemies and not by an ordinary trespasser. In *Nichols* v. *Marsland*, L.R. 10 Ex. 255, the rule in *Rylands* v. *Fletcher* was held not to apply to an escape of water caused by an abnormal storm amounting to " Act of God." Counsel, in that case, apparently regarded an act of the Queen's enemies as on a par with an earthquake, but the court did not have to pronounce on that question.

Notes.

Mr. P. B. Skeels, coroner for Metropolitan Essex, has been elected President of the Coroners' Society of England and Wales.

Owing to the heavy criminal calendar at Chester Assizes, the judges, Hallett and Stable, JJ., have decided to postpone Swansea Assizes. Commission day will now be 13th July instead of 10th July.

At the annual meeting of the Kent Law Society, held in Maidstone on the 26th June, Mr. Wm. G. Weller, of Bromley, was duly elected President for the ensuing year, and Mr. J. W. Gambrill, of Folkestone, Vice-President.

The Treasury have made an order (Safeguarding of Industries(Exemption) No. 1 Order, 1943, S.R. & O., 1943, No. 854) under s. 10 (5) of the Finance Act, 1926, renewing until the 30th June, 1944, the exemption from key industry duty of all articles at present exempt.

The quarterly meeting of the Lawyers' Prayer Union will be held on Monday, 19th July, at 6 p.m. in the Council Room of The Law Society. The speaker on this occasion will be Mr. Donald F. Ackland, Editorial Secretary of the London City Mission, and his subject is " A War-time Mission Field."

Landlord and Tenant Notebook.

Furnished Premises: Tenant's Responsibility for Furniture.

THE question of the nature and extent of the responsibility imposed on a tenant of furnished premises for the furniture "let together" with the premises is one on which we have, as yet, little authority. *Phillimore* v. *Lane* (1925), 41 T.L.R. 469, is undoubtedly a useful decision, as far as it goes; but it was a case in which there were carefully drawn covenants on the construction of which the result depended (and the fact that the rent was thirty guineas a week suggests that the property was somewhat out of the ordinary).

The claim was by the landlord for damage done to the furniture by burglars. Two covenants were relied upon: one, to deliver up the furniture and effects in as good order and state as the same were in at the date of the agreement, reasonable wear and tear and use allowed for, and damage by fire, etc., excepted, the other to make good, pay for or replace all articles of furniture and effects which might be broken, lost, damaged or destroyed by the defendant, his family, his servants or others during the tenancy. The term was six months, but owing to ill health the defendant quitted the house in the second month, leaving a married couple on the premises as caretakers. One night during the fourth month burglars broke in and did £127 5s. 6d. worth of damage to furniture and effects, and this was the amount claimed.

The plaintiff's argument on the first covenant was that the "fire, storm and tempest" express exception showed that damage by burglars was not excepted by implication; on the second, that the burglars were "others." The defendant, after contending (successfully) that he had not been negligent, submitted that the covenants did not extend to cover the criminal acts of third parties, citing *Tisdale* v. *Essex* (1617), Hob. 34. The presence of the second covenant, it was argued, showed that the tenant was not to be made an insurer.

Rowlatt, J., having found that there was no negligence, held that the first covenant imposed an absolute obligation for anything not excepted; and that the second, even if "burglars" were not excluded by the *ejusdem generis* rule, merely amplified the first obligation, making it more clear.

His lordship is not reported to have referred expressly to *Tisdale* v. *Essex*, but as the decision in that case was one construing a covenant for quiet enjoyment ("The law shall never judge that I covenant against the wrongful act of strangers, except my covenant express to that purpose . . . If I warrant land to you expressly, yet I shall not depend against tortious entries") and thus one which deals with rights conferred rather than with obligations undertaken, it may have been considered unhelpful.

At all events, *Phillimore* v. *Lane* shows that authority on the type of obligation discussed is scanty; and I think that there are only two other reported decisions on the subject of my article, in one of which, *Johnstone* v. *Symons* (1847), 11 J.P. 618, the facts were somewhat unusual; the defendant, having taken what was described as a "cottage ornée," with furniture, by an agreement which would have been far more suitable for the letting of a large farm, was alleged, *inter alia*, to have given poultry unrestrained access to the house with the result that the furniture became "foul and miry"; Patteson, J., held that he was entitled to recover despite a tenant's covenant to use the property according to the course and usage of good husbandry and the custom of the country. The other, *Stanley* v. *Agnew* (1844), 12 M. & W. 837, is perhaps more interesting because while a point of pleading was at issue, Pollock, C.B., used the occasion to express a general view on the construction of obligations of the kind we are dealing with.

In his declaration, the plaintiff landlord spoke of an agreement "to take due care of the furniture, linen, etc., during the tenancy, and at the expiration thereof to leave the said . . . furniture, linen, goods and chattels cleaned." In his evidence, he stated that the tenant had agreed to leave the furniture, etc., as he found it. The defendant seized upon the (apparent) discrepancy, complaining that the obligation deposed to was larger than what had been alleged; the case he was to meet was one of failing to clean regardless of the state in which the goods had been when the term began. It was held by all three members of the court, in effect, that there was no discrepancy: the position was consistent with the furniture having been clean when the tenancy began. But the general observations of Pollock, C.B., which are of particular interest were as follows: "This is a case where much depends upon the understanding of the parties who contract, with reference to a variety of circumstances—the description of the premises, the locality, and other matters; and the agreement ought not to be construed with the same nicety as in contracts relating to more extended transactions."

These words are likely to be referred to if ever we have a case in which a landlord claims for the loss of furniture, or damage done to it, by burglary, but is unable to invoke any express covenant. The questions will then arise is there (*a*) any implied contractual obligation; (*b*) any obligation in tort.

It will be convenient to deal with the second question first. In *Phillimore* v. *Lane*, the argument advanced for the plaintiff virtually conceded that if the action had been based on the bailment only, it must have failed: the contract, however, enlarged the common law liability.

It would certainly appear to be a sound proposition that the bailment should be classed as "hire of chattels," the *locatio conductio* of Justinian and *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909. Consequently, that if the tenant-bailee can show that the damage or loss was not due to his negligence, he is absolved from liability therefor. But this is subject to there being no "special contract" to the contrary. Such a contract can place either party in a better position: it can provide that the tenant shall be liable as an insurer, or it can relieve him of liability even for negligence (a modern example of the latter was afforded by *Brice & Sons* v. *Christiani & Nielsen* (1928), 44 T.L.R. 335).

The authorities do not suggest that the "special contract" must expressly enlarge or reduce the common law liability—indeed, in the case just cited, the intention was gathered from an agreement by the owners of the chattel to insure—and this leads me to suggest that the contract of tenancy may have the effect of imposing on the tenant the same responsibility for chattels "let" with premises as for the premises themselves. A tenant who enters into no express covenants is impliedly obliged to keep the premises in tenantable repair and to deliver them up with their nature unchanged; could it not be said that when furniture is included in the contract the same duty is imposed? At all events, it would not be safe to say that there may not be "matters" and "circumstances" pointing, in the words of Pollock, C.B., cited above, to an "understanding" to this effect.

To-day and Yesterday.

LEGAL CALENDAR.

July 5.—When the fourth Lord Chedworth died in 1804 his will was a disappointment to his relatives. He was unmarried and had lived for some time in the house of a Yarmouth surgeon, away from his great estates, absorbed in Shakespearean studies. His tastes extended to the stage and the turf. Under his will liberal benefits were conferred on his host, on Charles James Fox, on his executors and on theatrical and other friends. The relatives disputed this will on the ground of insanity and the matter came up for trial in the King's Bench on the 5th July, 1806. The evidence in favour of his soundness of mind was overwhelming. Fellow peers testified to the accuracy of his notes at the trial of Warren Hastings; Lord Eldon declared his belief in his sanity; so did fellow magistrates in the Court of Quarter Sessions at Ipswich, of which he was chairman; Henry Cowper, Clerk of the House of Lords, said that when he came into office Lord Chedworth gave him some valuable instruction in his duties; several King's Counsel testified to his intelligence and one of them declared that "nobody could puzzle him by cross-examination in Blackstone or Heber's list" (the racing calendar); this gentleman used to send him an account of any curious case on circuit. The other side proved no more than some harmless eccentricities. He was "a little skittish with a fine young woman once at Ipswich in a lane," which if it be insanity, said counsel, "God help the best of us!" The jury, under the direction of Lord Ellenborough, had no hesitation in finding the testator sane.

July 6.—Sir Nicholas Tindal, Chief Justice of the Common Pleas, died at Folkestone on the 6th July, 1846. About ten days before he had attended the hearing of an Irish appeal in the House of Lords. On leaving he complained of excessive heat and appeared to be almost fainting. A few hours later he was seized with paralysis in the left leg as far as the hip joint. After two or three days his medical adviser recommended him to proceed to the seaside. Though he went at once he never recovered.

July 7.—Sir George Wood, formerly one of the Barons of the Court of Exchequer, died on the 7th July, 1824, at his house in Bedford Square. He was eighty-one years old. The son of a Yorkshire clergyman, he was first articled to a neighbouring attorney who observed so much ability in him that he often said he would one day be a judge and eventually persuaded him to try his fortune in London. Wood had no external advantages, being very short, flat featured, dark complexioned, and in manner blunt. He had a poor voice and a provincial dialect. But his merits shone through his disadvantages. So many of his pupils attained distinction that he was called "The Father of the Bar." He left a fortune of nearly £300,000.

July 8.—Robert Aslett spent twenty-five years in the service of the Bank of England and then, having started to speculate, he defrauded it of upwards of £100,000 by embezzling Exchequer bills, for his immediate chief was very old and after fifty-eight years in the Bank had relaxed his vigilance. When he was discovered it was found that there was a flaw in the bills in that they were not signed by the auditor of the Exchequer. Accordingly, when he was first tried at the Old Bailey on the 8th July, 1804, he was acquitted on the ground that they were not good bills. He was subsequently convicted on other charges

and condemned to death, but he was afterwards respited during His Majesty's pleasure.

July 9.—On the 9th July, 1840, Edward Oxford, a lad of eighteen, who had worked as a barman, was tried at the Old Bailey on a charge of high treason. There was no doubt that he had discharged two pistols at Queen Victoria while she was driving with the Prince Consort in an open carriage up Constitution Hill. Both shots missed and he was arrested. In a box in his room the police found a sword, some black crepe, powder, bullets and a bullet mould, and also some very strange documents which seemed to have come straight out of the dream of a Simon Tappertit. There were the rules of a fictitious society called "Young England," which began by providing "that every member shall be provided with a brace of pistols, a sword, a rifle and a dagger. The two latter to be kept at the committee-room." Provision was made for an oath of allegiance, for fictitious names for the president, council, generals, captains and lieutenants, for disguises, marks of distinction and leave of absence from "the commander in chief." There were also three high-sounding letters purporting to come from the secretary.

July 10.—The defence called evidence to establish the insanity of the prisoner's father and grandfather who were both strange and violent in their behaviour. His mother told how he would often burst into tears or laughter without any assignable cause, habitually talked in a way which showed an anxious craving for celebrity and often presented pistols at her head. On the 10th July, the second day of the trial, the jury acquitted him on the ground of insanity, and he was accordingly ordered to be detained.

July 11.—It was on the 11th July, 1681, at Tyburn, that a man was last executed in England for his religion. Oliver Plunket, Roman Catholic Archbishop of Armagh, whom Lord Chief Justice Campbell has described as "a man of splendid abilities, profound learning, unblemished life and, what is more to the purpose, of unquestionable loyalty, who was not only remembered by those of his own religious persuasion, but, having under four successive Lord Lieutenants exerted himself to preserve the peace of the country and to foster English connection, was respected by all enlightened Protestants." On the strength of fantastic allegations of preparing a French invasion and drilling 75,000 Irishmen, he was charged with treason. No Irish jury would have convicted, so he was brought to England and tried before his witnesses had arrived. Chief Justice Pemberton in sentencing him to be hanged, drawn and quartered told him: "The bottom of your treason was your setting up your false religion." Bound to a wooden hurdle, he was taken to Tyburn and died calmly protesting his innocence and praying for forgiveness for his adversaries. His body now lies in Downside Abbey and his head is in St. Peter's Church at Drogheda.

TWO WAR-TIME DRAMAS.

The recent acquittal at the Old Bailey of a Polish lieutenant charged with the murder of another officer who had become his rival in his wife's affections bears a striking resemblance to a legal drama of the last war, the trial of Lieutenant Malcolm in the same place for the murder of Anton Baumberg, a Polish Jew passing under the name of "Count de Borch." The recent case, like the former one, was, in the words of Mr. Justice Humphreys in his summing up, an example of one of the oldest stories in the world, that of a woman and two men. "The story usually goes on to a meeting between the two men where no third party is present. From that meeting one comes back alive." That was just what happened in the case of Malcolm. While he was on active service in France his newly wedded wife lost her head to a shady adventurer, perhaps a blackmailer, living by his wits and regarded with suspicion by the police. She wanted to go away with him, though her husband during a brief leave had done all he could to break the association, pleading lovingly with her and threatening to thrash and maim the man, who about that time had bought a revolver. In the final act of the tragedy, Malcolm again returning from abroad, found out his lodging and sought him out there with a horsewhip; he also had a revolver. There was a struggle between them in the room alone and Borch was shot dead. The present Lord Chancellor, then Sir John Simon, defended Malcolm, who did not give evidence, insisting that the proper inference from the facts proved was that in the last resort the fatal shot was fired in self defence, when Borch was within reach of his own weapon. His advocacy, brilliant and sympathetic, careful and compelling, secured an acquittal, which was one of the finest achievements of his career at the bar. At the end of his long speech he was too exhausted to hear the cheering which his words had drawn from spectators in the court.

Honours and Appointments.

The Lord Chancellor has appointed Mr. STANLEY GEORGE CLARKSON, Registrar of the Norwich, Harleston, N. Walsham, Great Yarmouth, East Dereham and Wymondham County Courts, to be in addition the Registrar of the Beccles and Bungay County Court as from the 1st July, 1943.

Mr. A. W. LEWEY, Attorney-General, Jamaica, has been appointed Attorney-General, Gold Coast.

Our County Court Letter.

Wife's Liability for Husband's Maintenance.

IN *Kent County Council* v. *Rice*, at Birmingham County Court, the claim was for £71 14s., as money due under an agreement. The plaintiffs' case was that the husband of the defendant was an inmate of one of their institutions. By an agreement, dated the 17th June, 1942, the defendant had undertaken to contribute 28s. 6d. per week towards her husband's support, but had fallen into arrear to the amount claimed. In January, 1943, the plaintiffs discovered that there was a marriage settlement, the trustees of which had been sending £9 per fortnight to the defendant for the maintenance of herself and her husband. This had been discontinued, when it was discovered that the husband was in an institution, and the trustees had since remitted a weekly sum to the plaintiffs direct. A bank clerk produced the defendant's receipts for the £9 per fortnight paid to her in 1942. The defendant's case was that her husband was a voluntary resident in the institution and could maintain himself there out of his private income. She was supporting herself by going out to work. His Honour Judge Dale gave judgment for the plaintiffs for the amount claimed, payable at £4 a month, with costs on Scale C. It is to be noted that agreements of the above nature are exempt from stamp duty, under the Poor Law Act, 1930, s. 162.

Idleness as Breach of Contract.

IN *Gloucester Aircraft Co., Ltd.* v. *Butler*, at Gloucester County Court, the claim was for £50 as damages for breach of contract. In September, 1942, the defendant had been transferred by the Ministry of Labour from Coventry to work with the plaintiffs. Their case was that the defendant wilfully and intentionally failed to exercise his skill, and, by lack of industry and deliberate idleness, failed to carry out his work within a reasonable time, and thereby caused the plaintiffs loss and damage. The particulars were as follows: From the 12th October to the 2nd November, the defendant took 106 hours and 45 minutes in work on five access doors, which work was normally done, by an average worker of similar skill and experience, in 17 hours and 45 minutes; from the 2nd November to the 9th December the defendant took 153 hours on five access doors as against an average by other workers of 19 hours and 50 minutes; from the 16th December to the 2nd January the defendant took 51 hours and 30 minutes to do the work for which the average time was 7 hours and 50 minutes; from the 10th January to the 11th February the defendant took 210 hours and 15 minutes on five access doors, as against an average of 8 hours and 50 minutes. His grievance appeared to be that he could earn more money in Coventry, and wished to return there. The National Service Officer had twice refused the defendant permission to return to Coventry, and the defendant's appeal had twice been rejected by the Local Appeal Board. In the above period the plaintiffs had paid the defendant £45 16s. 1½d., whereas the actual work he had done was only worth £6 14s. 11d. The plaintiffs, therefore, claimed repayment of the difference. The balance of their claim was in respect of loss of use of tools, while the defendant was wasting time with them. The defendant's case was that his low output was due to shortgage of tools and illness. An adjournment was granted to enable evidence to be called on the latter point. At the resumed hearing, His Honour Judge Wethered held, that illness was not the cause of the low output. The defendant had adopted the tactics advised by wireless to workpeople in enemy-occupied countries. This was a species of sabotage, and the defendant was fortunate not to be before another court on a different charge. Judgment was given for the plaintiffs for £45, with costs.

Dissolution of Partnership.

IN *Latham* v. *Turner*, at Walsall County Court, the claim was for (1) an account of the dealings of a fruit and greengrocery business, (2) an order for the winding up of a partnership in the business, (3) the return of a motor car or its value and £10 as damages for its detention. The defence was a denial of the existence of any partnership. The plaintiff's case was that she was the administratrix of her sister, Mrs. McEvoy, who died in September, 1941. For thirty years the late Mrs. McEvoy and the defendant had lived together and had been in the same business. After the funeral, the defendant had handed a bank book to the plaintiff, and had admitted that she (the defendant) had carried on the business with Mrs. McEvoy on a fifty-fifty basis. During the trial a balance sheet of the business was produced, from which it transpired that the value of the assets (including the motor car) exceeded £500. As this was beyond the jurisdiction of the county court, an application was made, on behalf of the defendant, for the claim to be dismissed. No opposition was offered, on behalf of the plaintiff, but it was pointed out that, if the value of the assets had been disclosed beforehand, costs would not have been thrown away by commencing proceedings in the county court. His Honour Judge Caporn dismissed the claim, but with costs to the plaintiff.

Points in Practice.

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Tenant's Liability for War Damage.

Q. A ninety-nine years' lease granted on the erection of a dwelling-house expired last year, and the following points arise with regard to dilapidations on which we should be glad of your views :—

(1) The premises suffered some war damage, under £100. The freeholder was not aware of this. The tenant, whether aware of it or not, gave no notice either to the freeholder or to the War Damage Commission. The freeholder claims that he is therefore entitled to include the cost of making good the war damage in his claim for dilapidations. The tenant contends that he cannot be made liable under the express terms of s. 1 of the Landlord and Tenant (War Damage) Act, 1939, and that there is no penalty on him, the tenant, or liability by reason of his not complying with s. 2 of that Act.

(2) The floors and some of the joists in the basement have rotted. The tenant maintains that this is because of lack of ventilation and that this is an inherent defect and he is exempted from liability to make good the damage.

(3) The tenant maintains that as the work totals considerably over £100 and the freeholder cannot effect repairs without a licence, no sum can be recovered from him until a licence is obtained and the freeholder is in a position to carry out the work or, alternatively, that the estimated cost of the work must be discounted heavily for immediate payment. The freeholder's contention is that the tenant's liability accrued when the lease expired and that it is quite immaterial whether the freeholder can carry out the work now or not or whether he does so or not, that the damage to the reversion was sustained at the time the lease expired and this became payable immediately.

A. (1) The tenant is not liable to make good war damage. The fact that the tenant gave no notice to the freeholder or to the War Damage Commission that war damage had occurred may cast doubt on his evidence that war damage occurred, or, on his evidence as to the nature and extent of the damage, but, assuming that the tenant can prove the war damage, he is not liable for it (s. 1 (1), Landlord and Tenant Act (War Damage), 1939).

(2) The answer to this depends on the terms of the repairing covenant, but a tenant is usually not liable for this sort of defect (see *Lurcott* v. *Wakely* [1911] 1 K.B. 905).

(3) Section 1 (2) of the 1939 Act may be invoked to suspend the obligations. Having regard to the extent of the war damage, compliance is " impracticable or only practicable at a cost which is unreasonable in view of all the circumstances," one of those circumstances being that a licence would have to be obtained to execute the repairs. Apart from a possible contention that s. 1 (2) applies to suspend the obligation, I do not think that there is anything in the nature of frustration so as to exempt the tenant from any obligation he may have undertaken under the repairing covenants (cf. *Moorgate Estates* v. *Trower* [1940] Ch. 206, in which an obligation to insure land against war damage was held not to be frustrated by an alteration in the law). In any case, it was held in *Leighton's Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd., and Others*, 167 L.T. 348, that a lease—even a building lease—is not subject to the doctrine of frustration.

Repairs to Pump.

Q. For many years prior to 1920 three adjoining country cottages were in common ownership, the water supply being obtained from a well on the centre property. In 1920 the cottages were sold to three different purchasers, and the purchasers of the two end cottages in their conveyances were each given a right to enter upon the centre property for the purpose of taking water from the well thereon subject to their bearing a due share of the cost of the repair and upkeep and renewal of the said well and the structure and appliances thereof. The owner of the centre cottage has recently adopted a difficult and obstinate attitude. He will himself do nothing to repair the well, the cover and windlass of which have fallen into disrepair, making it difficult to draw water and endangering the purity of the water in the well. The owners of the two end cottages have made repeated requests for the well to be repaired, and have offered to bear the whole of the expense. The district council has now been approached upon the matter, but in view of the fact that there is at present an adequate supply of satisfactory water and that the owners of the end cottages have not been denied the access to the well, the council say that they are unable to intervene in the matter. Your advice would be appreciated as to the steps which the owners of the adjoining cottages should take to enforce their rights against the owner of the centre cottage.

A. The owners of the two end cottages are entitled to enter the land of the middle cottage to repair the pump. If prevented, they can claim damages and an injunction. See *Jones* v. *Pritchard* [1908] 1 Ch., at p. 638.

Books Received.

Willis's Workmen's Compensation. Thirty-fifth Edition by W. Addington Willis, C.B.E., LL.B., of the Inner Temple, and R. Marven Everett, of Gray's Inn, Barristers-at-Law. 1943. Crown 8vo. pp. clii, 1158 and (Index) 101. London: Butterworth & Co. (Publishers), Ltd. 27s. 6d. net.

Summerhay's and Toogood's Precedents of Bills of Costs. First Supplement to Eleventh Edition. By C. T. Parker and R. E. Fry, Practising Costs Draftsmen. 1943. Medium 8vo. pp. iv and 39. London: Butterworth & Co. (Publishers), Ltd. 10s. 6d. net.

The North Carolina Law Review. April, 1943. No. 3, Vol. 21. U.S.A.: University of North Carolina.

World Court Reports. A collection of judgments, orders and opinions of the permanent court of International Justice. Edited by Manley O. Hudson. Vol. IV, 1936–42. 1943. Royal 8vo. pp. xvi and (with Index) 513. U.S.A.: Columbia University Press. $2.50.

1942 Annual Digest. Containing Decisions in Scots Cases between 1st September, 1941, and 31st August, 1942. Prepared for the Faculty of Advocates by R. C. Macfarlane, Advocate. 1943. pp. iv and 151. Edinburgh: Wm. Hodge & Co., Ltd.; T. & T. Clark. 10s. 6d. net.

English Law. By Professor J. L. Brierly. No. H.6. Oxford Pamphlets on Home Affairs. 1943. pp. 40. London: Oxford University Press. 6d. net.

Burke's Loose-Leaf War Legislation. Edited by Harold Parrish, Barrister-at-Law. 1943 Volume. Part 3. London: Hamish Hamilton (Law Books), Ltd.

Burke's Encyclopædia of War Damage and Compensation. Edited by Harold Parrish, Barrister-at-Law. Supplemental Part No. 9. London: Hamish Hamilton (Law Books), Ltd.

War Legislation.

Statutory Rules and Orders, 1943.

EP. 882. **Apparel and Textiles.** Black-out Cloth (Utility) Directions, June 26.

E.P. 895. **Control of Paper** (No. 48) Order, 1942. Direction No. 7, June 25.

No. 896. **Food and Drugs.** Public Health (Dried and Condensed Milk) Regulations, June 24.

E.P. 892. Food (Points Rationing) Order, 1943. Amendment Order, June 25. (Biscuits and canned condensed milk).

E.P. 879. **Fuel and Lighting** Registration and Distribution Order, 1942. General Direction (Restriction of Supplies) No. 7, June 22.

E.P. 891. **Preserves** (Rationing) Order, 1942. Amendment Order, June 25. (Sugar in lieu of preserves).

No. 878. **Prison, England.** Local and Convict Prisons. The Prison Rules, June 18.

No. 854. **Safeguarding of Industries** (Exemption) (No. 1) Order, June 23.

No. 897/L. 18. **Supreme Court, England.** Procedure. Non-Contentious Probate Rules, June 25.

E.P. 863. **Toilet Preparations** (No. 2) Order, June 25.

No. 862. **Trading with the Enemy** (Specified Persons) (Amendment) (No. 9) Order, June 23.

No. 889. **Wild Bird, England.** The Wild Birds Protection (Administrative County of Devon) Order, June 16.

No. 885. **Workmen's Compensation.** Coal Mining Industry (Pneumoconiosis) Compensation Scheme, June 22.

No. 886. Workmen's Compensation. Pneumoconiosis (Benefit) Scheme, June 22.

No. 888. Workmen's Compensation. Pneumoconiosis (Medical Fees) Regulations, June 22.

No. 887. Workmen's Compensation. Silicosis and Asbestosis (Medical Arrangements) Amendment Scheme, June 22.

Wills and Bequests.

His Honour Arthur William Bairstow, K.C., of Farm Avenue, N.W., left £29,074, with net personalty £28,811.

Sir Benjamin Arthur Cohen, K.C., of Temple Gardens, E.C., left £97,321, with net personalty £96,392.

Mr. John Gerard Cobb, solicitor, of College Hill, E.C., left £206,105, with net personalty £204,310. He left £1,000 to Westminster Hospital.

Mr. John James Dallas, solicitor, of Goosnargh, left £42,323, with net personality £39,752. He left £100 to the Solicitors' Benevolent Association.

Mr. Henry Pumfrey, solicitor, of Barnet, Herts, left £72,023, with net personalty £64,660.

Mr. Gerald Philip Stevens, barrister-at-law, of Parkstone, Dorset, left £31,556, with net personalty £28,999.

Mr. John Tibbits, solicitor, and for many years Magistrates' Clerk and Coroner for Warwick, left £1,735, with net personalty £1,688.

Mr. R. H. Whittington, solicitor, of Bath, left £20,062, with net personalty £17,171.

Notes of Cases.

HOUSE OF LORDS.

Marshall (or Wilkinson) *v.* Wilkinson.

Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Clauson. 9th June, 1943.

Scotland—Divorce—Desertion—Within statutory period pursuer commits adultery—Jurisdiction to grant divorce—Divorce (Scotland) Act, 1938 (1 & 2 *Geo.* 6, *c.* 50), *s.* 1 (1) (*a*).

Appeal from the Court of Sessions.

The pursuer brought this action in the Scottish Courts against her husband, who was in Canada, on the ground of desertion. The suit was undefended. In May, 1925, her husband left the pursuer in Scotland and went to Canada intending that she and their children should join him. About the 6th July, 1926, he changed his mind, and his desertion of his wife began. As the result of an isolated act of adultery in June, 1929, the wife gave birth to an illegitimate child in February, 1930. Her action was dismissed. By s. 1 (1) of the Divorce (Scotland) Act, 1938: "Without prejudice to the power of the Court to grant decree of divorce on the ground of adultery, it shall be competent for the Court to grant decree of divorce on any of the following grounds, that is to say, that the defender (*a*) has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years . . ."

Lord Thankerton said that it was contended for the wife that the change in the law which had been effected by the Act of 1938 was that a spouse, who had committed adultery within the statutory period of three years, was no longer precluded from getting a divorce on the ground of desertion, provided that such adultery could be shown not to have contributed to, or influenced, the defender's original or continued desertion. He could find no indication of such change in the Act of 1938. The argument proceeded on a fallacious view of two matters. It ignored the real reason for the disqualification which the law imposed prior to 1938 on a pursuer who had committed adultery. The admission of adultery was inconsistent with a proper desire for the return of the deserting spouse. Where a spouse was not entitled to require adherence, willingness to adhere could only be made effective by consent of the other spouse. The appeal should be dismissed.

Lord Macmillan and Lord Clauson delivered judgments agreeing in dismissing the appeal.

Viscount Simon, L.C., and Lord Atkin delivered dissenting judgments.

Counsel: *Clyde*, K.C., and *E. Keith* (both of the Scottish Bar), for the wife. The husband was not represented.

Solicitors: *Beaumont, Son & Rigden*, for *Wishart A. Sanderson*, W.S., Edinburgh, and *W. B. Maxwell*, Hawick.

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

COURT OF APPEAL.

Hollington *v.* F. Hewthorn & Co., Ltd.

Lord Greene, M.R., Goddard and du Parcq, L.JJ. 7th, 11th, 12th, 28th May, 1943.

Evidence—Admissibility of conviction for careless driving in action for damages for negligent driving—Statement by deceased party to action to police constable soon after accident—Whether proceedings then anticipated—Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1 (3) *and* (5).

Defendants' appeal from a judgment of Hilbery, J., in an action for damages for personal injuries and damage to a motor car, alleged to have resulted from the defendant's negligent driving of a motor car on the highway.

The plaintiff's son had originally been a plaintiff and was driving the car at the time of the accident, but he had since died, though not as a result of the accident, and the plaintiff continued his son's action as administrator of his son's estate. No one except the drivers of the two cars involved saw the accident. The only witness called by the plaintiff was a police constable, who spoke of the position of the cars when he arrived on the scene after the accident, and the plaintiff himself, who arrived on the scene soon after the constable. The plaintiff then found each car on its proper side of the white line. The defendant's car had its rear off-side wheel 2 feet from the white line and the front near-side wheel 15 inches from the side of the road, which was 21 feet 4 inches wide. The plaintiff's car was pointing diagonally towards the off-side; the rear near-side wheel was 5 inches from the near-side kerb and the off-side wheel was 34 inches from the kerb; the front off-side wheel was 19 inches from the white line. The only marks on the road were made by oil which had dripped from the plaintiff's car as it stood there. The plaintiff's car was heavily damaged right across the front and the defendant's car was damaged down its off-side and also on the off-side of the front. Both cars were practically level with each other. No more evidence was given, because at the close of the plaintiff's case counsel submitted that there was no case to answer and elected to call no evidence. The defendant had alleged negligence on the part of the deceased plaintiff and had counter-claimed, and Hilbery, J., rightly as the Court of Appeal held, did not allow defendant to call evidence on his counter-claim after his election to call no evidence on the claim. The learned judge rejected as inadmissible evidence a conviction of the defendant's driver for driving on the day and in the parish in question without due care and attention, and also a signed statement made by the deceased driver to the police constable soon after the accident. The learned judge drew the inference from the position of the cars as found by the police constable and from the damage suffered that the defendant had been on his wrong side and had made a desperate effort to swerve back to his near side, thus going across the front of the plaintiff's car.

Goddard, L.J., delivering the judgment of the court, said that they were unable to agree that the inference made by the learned judge was justified. The damage to the cars was equally consistent with either car being at fault. As to the conviction, Lord Ellenborough, commenting on the maxim *communis error facit jus*, said that it would be more true to say that *communis opinio* was evidence of what the law was (*Isherwood* v. *Oldknow* (1815), 3 M. & S. 382). It had been the invariable practice of the judges for many years to reject this class of evidence, so that now counsel had ceased to tender it in accident cases. The court should be slow to differ from the *communis opinio* unless it could be shown to have been based on wrong premises. In former days not only were the parties incompetent, but also any person who was or could be interested in the question at issue. However, nowadays, relevance and not competency was the main consideration. The conviction was only proof that another court considered that the defendant's driver was guilty of careless driving, even if it were proved that it was the accident which led to the prosecution. The evidence and arguments before the criminal court were not known to the civil court, nor was the issue in the criminal proceedings the same as the issue in the civil proceedings. His lordship referred to *R.* v. *Warden of the Fleet* (1698), 12 Mod. Rep. 337; *Gibson* v. *McCarty* (1736), Lee 311; *Blakemore* v. *Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133; *Castrique* v. *Imrie* (1870), 4 H.L. 414; *Wilkinson* v. *Gordon* (1824), 2 Add. 152; *March* v. *March* (1858), 28 L.J.P. & M. 30; *In the Estate of Crippen* [1911] P. 108; *Partington* v. *Partington* [1925] P. 34; *O'Toole* v. *O'Toole* (1926), 42 T.L.R. 245; and said that the last three cases went beyond and were contrary to the authorities and ought not to be followed in future. The question of the admissibility of the statement made by the deceased to the police constable turned on s. 1 (3) of the Evidence Act, 1938, which rendered inadmissible a statement by a person interested, at a time when proceedings were pending, or anticipated, involving a dispute as to any fact which the statement might tend to establish. The warning required by the Road Traffic Act, 1930, s. 21, was given to the deceased before he made it. It was not the same sort of warning, nor were the circumstances the same, as in *Robinson* v. *Stern* [1939] 2 K.B. 260. Here from the statement the defendant practically admitted that it was his fault, but some time afterwards came and said that it was the fault of the deceased. In those circumstances the court thought that the deceased must have anticipated the likelihood at least of civil proceedings, and consequently the statement was not admissible. The defendant's appeal would succeed and judgment would be entered for the defendant with costs.

Counsel: *J. D. Caswell*, K.C., and *E. Holroyd Pearce*; *A. T. Denning*, K.C., and *Harold S. Simmons*.

Solicitors: *P. A. Gascoin*; *Leader, Henderson & Leader*.

[Reported by Maurice Share, Esq., Barrister-at-Law.]

In re Anglo-International Bank, Ltd.

Lord Greene, M.R., Luxmoore and Goddard, L.JJ. 1st June, 1943.

Company—Reduction of capital—Special resolution—Notice of meeting not sent to shareholders in enemy territory—Validity of notices—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 115 (1)—*Trading with the Enemy Act*, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 2 (1) (*a*).

Appeal from a decision of Bennett, J.

The appellant company had a capital of £2,000,000, of which £1,960,008 shares of £1 each had been issued. Of these 46,552 shares were held by ninety-nine shareholders whose registered addresses were in enemy, or enemy-occupied territory. At an extraordinary meeting held on 24th February, 1943, under s. 117 (1) of the Companies Act, 1929, a special resolution was passed for the reduction of the company's capital to 1,609,998 shares of 15s. each and 39,992 shares of £1 each, by repayment of 5s. a share and thereafter for the increase of the capital by the issue of 490,002 shares of £1 each. The resolution was passed unanimously by holders of 1,802,406 shares. No notice of the meeting had been sent to the ninety-nine shareholders in enemy, or enemy-occupied, territory. On the company's petition to confirm the reduction of capital, Bennett, J., refused to confirm the reduction, on the ground that no effective resolution for reduction had been passed, as no notices had been sent, or attempted to be sent, to the ninety-nine shareholders. The company appealed.

Lord Greene, M.R., said that the right of a member to receive a notice was determined by the contract to be found in the articles. If the right of the shareholder to receive the contractual notices was abrogated or suspended by operation of law, the shareholder during the period of abrogation must be treated as having lost his contractual right to receive notices. On behalf of the company it was argued that the right of the ninety-nine shareholders to receive notices was suspended both at common law and under the Trading with the Enemy Act, 1939. With regard to the common law position, the shareholders whose registered addresses were in enemy territory must be regarded as alien enemies whatever their nationality (*V/O Sovfracht* v. *van Udens* [1943] A.C. 203). So long as they retained their enemy character, their right of voting was suspended. The question whether or not the shareholders in territories in enemy occupation were to be regarded as enemies at common law depended upon the character of the occupation. Upon the evidence, it would not be safe to hold that all the shareholders whose registered addresses were in enemy occupied territory were to be regarded as alien enemies at common law. But the position under the Trading with the Enemy Act, 1939, was different. As a result of that Act the Company was forbidden by law to have any communication with the ninety-nine shareholders. This was equivalent to suspending their rights to receive notices. The resolution was therefore validly passed. The court had been referred to the power of the Crown to grant a licence to communicate with the enemy. There was no obligation on the company to apply for such licences. All the shareholders were entitled to was to have the notices posted to them and this was forbidden by law. Appeal allowed.

Counsel: *Harold Christie*, K.C., and *Cecil Turner*.

Solicitors: *Freshfields, Leese & Munns*.

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

CHANCERY DIVISION.

In re **Plowman; Westminster Bank, Ltd.** *v.* **Plowman.**

Cohen, J. 11th June, 1943.

Will—Life interest in testator's residuary estate undisposed of—Application of life interest—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 33, 46, 49.

Adjourned summons.

The testator by his will gave the remainder of his estate to be held in trust, after the death of his wife, subject to the payment of certain legacies, for charity. The testator died in 1942. He was survived by his widow and two sisters, who were his next of kin. The learned judge held the income of the testator's residuary estate was undisposed of during the widow's life and passed as on an intestacy. The summons raised the further question whether the income of the residuary estate was wholly payable to the testator's widow or whether each instalment of income should be apportioned between capital and income and, if so, on what principle.

COHEN, J., said that but for the decision in *Re McKee* [1931] 2 Ch. 145, it might have been argued that the undisposed of income fell to be dealt with under s. 33 of the Administration of Estates Act, 1925, and was therefore subject to a trust for sale and that it should be sold and the widow would be entitled only to the income arising from the proceeds of sale. That decision made it impossible so to hold. The judgment in the Court of Appeal in that case made it clear that s. 33 applied only to cases of intestacy affecting the whole interest in the estate or some part of it. It did not apply to an intestacy as to a partial interest in the residuary estate, such as a life interest. It was, however, contended that, as and when each instalment of income was received, it must be treated as part of the residuary estate and therefore must under s. 46, subject to the payment of £1,000 to the widow with interest at 5 per cent., be invested, only the interest of such investments being payable to the widow. On the other hand, it was argued on behalf of the widow that what was undisposed of was income of the residuary estate and that the principle laid down in *In re McKee* applied and, accordingly, the balance of income was payable to the widow. He had come to the conclusion that the latter contention was well founded. The property undisposed of was the income of the testator's residuary estate. That residuary estate arose, not from the operation of s. 33, but from the performance of the duties imposed on the executor by virtue of his appointment in the will. None the less, it was income of the residuary trust fund. He had derived some assistance from *In re Thornber; Crabtree* v. *Thornber* [1937] 1 Ch. 29. As there was nothing but income in question, under s. 49 the whole of the undisposed of income would be held under s. 46 upon trust for the widow.

COUNSEL: *G. D. Johnston; Vanneck; J. A. Wolfe; Danckwerts.*

SOLICITORS: *M. Greenwood; Treasury Solicitor.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

Societies.

THE ASSOCIATION OF CZECHOSLOVAK ADVOCATES.

This Association, which was established early in 1942, held its second annual meeting on the 26th June, 1943, at the Czechoslovak Institute. It comprises now 117 Czechoslovak advocates and candidates for the profession. From the annual report which was read at the meeting it appeared that the Association has done some good work during the first year of its activities arranging a number of interesting lectures, partly in Czech and partly in English and developing friendly relations with allied lawyers, in particular with members of Lincoln's Inn and The Law Society, and with the Association of Polish Lawyers in this country. Special tribute was paid at the meeting to the two mentioned British institutions for the interest which they have shown for the Association's work and for the assistance granted to it. Particular stress was laid on the fact that three of the English lectures were presided over by Sir Stanley Pott, President of The Law Society, Sir George Rankin, Judicial Member of the Privy Council, and Sir Arnold McNair, Vice-Chancellor of the University of Liverpool. Sir Cyril Atkinson, Honorary Treasurer of Lincoln's Inn has also been taking a particular interest in the Association, and has helped it in many ways.

A branch of the Association has been founded in the Middle East, counting about 200 members, and consequently the Association changed its name into "Association of Czechoslovak Advocates Abroad."

At the meeting the expectation was voiced that during the current year of its activities the Association would succeed in strengthening its relations with allied jurists and thus preparing the basis for permanent collaboration after the war.

The address of the Association is 43/4, Warrington Crescent, W.9, CUNingham 3755, and its Secretariat will answer with pleasure any inquiries with regard to its agenda.

Rules and Orders.

S.R. & O., 1943, No. 897/L.18.

SUPREME COURT, ENGLAND.—PROCEDURE.

THE NON-CONTENTIOUS PROBATE RULES, 1943. DATED JUNE 25, 1943

I, the Right Honourable Frank Boyd, Baron Merriman, President of the Probate, Divorce and Admiralty Division of the High Court of Justice, with the concurrence of the Right Honourable John, Viscount Simon, Lord High Chancellor of Great Britain, and the Right Honourable Thomas Walker Hobart, Viscount Caldecote, Lord Chief Justice of England by virtue of s. 100 of the Supreme Court of Judicature (Consolidation) Act. 1925,* and all other powers enabling me in this behalf, do hereby make the following Rules:—

1. In these Rules:—

"The Principal Registry Rules" means the Rules and Orders and Instructions for the Registrars of the Principal Registry of the Court of Probate in respect of Non-Contentious business, dated the 30th day of July, 1862, as amended by any subsequent Rules;

"The District Registry Rules" means the Rules and Orders and Instructions for the Registrars of the District Registries of the Court of Probate, dated the 27th day of January, 1863, as amended by any subsequent rules.†

2. The following Rule shall stand as Rule 49A in the Principal Registry Rules:—

"*Grants of Probate under the Execution of Trusts (Emergency Provisions) Act*, 1939.

49A. Upon an application for a grant of probate to an executor who has delegated his functions as such under Section 1 (1) or (5) of the Execution of Trusts (Emergency Provisions) Act, 1939, the requirements of Rules 47 and 49 may be fulfilled by the duly appointed attorney of such executor."

3. The following Rule shall stand as Rule 60A in the District Registry Rules:—

"*Grants of Probate under the Execution of Trusts (Emergency Provisions) Act*, 1939.

60A. Upon an application for a grant of probate to an executor who has delegated his functions as such under Section 1 (1) or (5) of the Execution of Trusts (Emergency Provisions) Act, 1939, the requirements of Rules 57 and 60 may be fulfilled by the duly appointed attorney of such executor."

4.—(1) These Rules may be cited as the Non-Contentious Probate Rules, 1943, and shall come into operation on the 10th day of July, 1943.

(2) The Non-Contentious Probate Rules, 1943, which come into operation on the 10th day of May, 1943, as Provisional Rules shall continue in force till the 10th day of July, 1943, on which day the said Rules shall be superseded and replaced by these Rules.

Dated the 25th day of June, 1943.

Merriman, P.

We concur, *Simon*, C.
Caldecote, C.J.

* 15 & 16 Geo. 5, c. 49.

† S.R. & O. Rev. 1904, XII, Supreme Court, E., p. 756; for amdts. *see* S.R. & O., 1921 (No. 649), p. 1287, 1925 (No. 1231), p. 1539, 1926 (No. 1044), p. 1246, 1932 (No. 1015), p. 1685, 1933 (No. 985), p. 1823, 1934 (No. 366) II, p. 604, 1937 (No. 113), p. 2244 and 1939 (No. 1514), p. 3123.

Parliamentary News.

ROYAL ASSENT.

The following Bills received the Royal Assent on the 6th July:—

Settled Land and Trustee Acts (Court's General Powers).
Telegraph.
Pensions and Determination of Needs.
Grand Union Canal.
Bridgwater Gas.

HOUSE OF LORDS.

Law Reform (Frustrated Contracts) Bill [H.L.].
Reported without amendment. [6th July.

London County Council (Money) Bill [H.C.].
Read First Time. [29th June.

Marriages Provisional Order Bill [H.C.].
Read Second Time. [30th June.

Town and Country Planning (Interim Development) Bill [H.C.].
Read Third Time. [6th July.

Water Undertakings Bill [H.L.].
In Committee. [6th July.

HOUSE OF COMMONS.

Restriction of Ribbon Development (Temporary Development) Bill [H.C.].
Read Second Time. [1st July.

Town and Country Planning (Interim Development) (Scotland) Bill [H.C.].
Read First Time. [1st July.

QUESTIONS TO MINISTERS.

RAILINGS REMOVAL: TENANT'S LIABILITY

Sir R. CLARRY asked the Parliamentary Secretary to the Ministry of Works what would be the position of a tenant who, on the expiry of his lease, was asked by the landlord, in accordance with the terms of the lease, to make good any dilapidations in the property, including the replacement of any railings that might have been removed by the Ministry, though the landlord and not the tenant had received official compensation for the removal of the railings; and whether, in such a case, the tenant would have the right of appeal to the General Claims Tribunal.

Mr. HICKS: The tenant is protected by the provisions of para. 2 of Defence Reg. 50B, which frees him from any such liability. [30th June.

DISPOSITIONS OF INCOME: CHARITABLE TRUSTS.

Rear-Admiral BEAMISH asked the Attorney-General whether he is aware of the cases concerning dispositions of income for utilisation by charitable trusts and the like which become the legal income of the recipients and which are not directed wholly into channels beneficial to the community, but are diverted again by devious methods for the benefit of disponers; and whether his powers are adequate for prevention and, if necessary, prosecution.

The ATTORNEY-GENERAL: I am not aware what cases my hon. and gallant Friend has in mind, but if he will send me particulars I will look into them. [30th June.